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NOV 18 1992

November 18, 1992

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: MM Docket No. 92-3  
RM-7874 and RM-7958

Dear Ms. Searcy:

Submitted herewith for filing, on behalf of our client, Schuyler H. Martin, permittee of Radio Station KPXA(FM), Sisters, Oregon, are an original and four copies of his Motion To Strike in the above-referenced proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS &  
HANDLER

By:

*Irving Gastfreund*  
Irving Gastfreund

Enclosures

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BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20534

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**NOV 18 1992**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.203(b)	)	MM Docket No. 92-3
Of The Commission's Rules	)	RM-7874 and
Table of Allotments	)	RM-7958
FM Broadcast Stations	)	
(Prineville and Sisters, Oregon)	)	

**TO: Chief, Mass Media Bureau**

**MOTION TO STRIKE**

SCHUYLER H. MARTIN ("Martin"), permittee of Radio Station KPXA(FM), Sisters, Oregon, by his attorneys, hereby moves to strike the Petition For Reconsideration filed in this proceeding on November 13, 1992, on behalf of the following broadcast licensees serving the below-listed communities in and around Bend, Oregon (hereinafter collectively referred to as "Petitioners"):

Central Oregon Broadcasting, Inc. (licensee of KBND, Bend, Oregon; and KLRR, Redmond, Oregon); Redmond Broadcast Group, Inc. (licensee of KPRB and KSJJ, Redmond, Oregon); Highlakes Broadcasting Company (licensee of KRCO and KIJK-FM, Prineville, Oregon; JJP Broadcasting, Inc. (licensee of KQAK, Bend, Oregon); Oak Broadcasting, Inc. (licensee of KGRL and KXIQ, Bend, Oregon); Sequoia Communications (licensee of KICE, Bend, Oregon); and The Confederated Tribes of the Warm Springs Reservation of Oregon (licensee of KTWS, Bend, Oregon; and KTWI, Warm Springs, Oregon).

In support whereof, it is shown as follows:

## I. Introduction

On October 7, 1992, the Allocations Branch of the Mass Media Bureau's Policy and Rules Division released its Report and Order in this proceeding, \_\_\_ FCC Rcd \_\_\_, DA92-1276 (released October 7, 1992), in which the Allocations Branch granted Martin's request to substitute Channel 281C1 for Channel 281A at Sisters, Oregon, and to modify Martin's construction permit for Radio Station KPXA(FM) to specify operations on Channel 281C1 in Sisters, Oregon. In granting this upgrade of the KPXA(FM) technical facilities, the Allocations Branch rejected certain contentions made by the Petitioners. A summary of the Report and Order was published in the Federal Register on October 14, 1992 - one week following the date of the document's release by the Commission. See 57 Fed. Reg. 47006 (October 14, 1992). On November 13, 1992, the Petitioners filed their joint Petition For Reconsideration, in which they challenge the determinations made in the Bureau's October 7, 1992 Report and Order in this proceeding.

For the reasons set forth below, the Petitioners' Petition For Reconsideration in this proceeding is untimely. Accordingly, the Petition For Reconsideration must be summarily stricken without consideration, since the Commission has no jurisdiction to consider a late-filed petition for reconsideration, pursuant to Section 405 of the Communications Act.

## II. Argument

Under Section 1.429(d) of the Commission's Rules (which governs the filing of any petition for reconsideration in this channel allotment rulemaking proceeding), a petition for reconsideration must be filed with the Commission "... within 30 days from the date of public notice of such action as that date is defined in § 1.4(b) of ... [the Commission's] ... rules." In defining the date of "public notice" of documents, Section 1.4(b) establishes a dichotomy as between documents in notice and comment rulemaking proceedings of general applicability, on the one hand, and documents in rulemakings of particular applicability, on the other hand; the former are governed by Section 1.4(b)(1), whereas the latter are governed by Section 1.4(b)(3).

Under Section 1.4(b)(3), the date of "public notice" is defined as follows in the following types of proceedings:

"For rule makings of particular applicability, if the rule making document is to be published in the Federal Register and the Commission so states in its decision, the date of public notice will commence on the date of the Federal Register publication date. If the decision fails to specify Federal Register publication, the date of public notice will commence on the release date, even if the document is subsequently published in the Federal Register." [Emphasis added.]

By contrast, under Section 1.4(b)(1) the date of "public notice" for documents in all other types of notice and comment rulemaking proceedings (i.e., rulemaking proceedings of general

applicability) is the date of publication of the document in the Federal Register.<sup>1</sup>

Unquestionably, this proceeding is a "rule making of particular applicability", within the meaning of Section 1.4(b)(3) of the Commission's Rules. As noted above, the Mass Media Bureau's October 7, 1992 Report and Order in this proceeding, substituted Channel 281C1 in lieu of Channel 281A at Sisters, Oregon, and modified Martin's construction permit for Radio Station KPXA(FM), Sisters, Oregon, to specify operations on the higher class channel, in fact on the very same channel (Channel 281) on which the station is presently authorized. The Mass Media Bureau's October 7, 1992 Report and Order in this

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<sup>1</sup> Section 1.4(b)(1) provides that the term "public notice" means the following date in the circumstances described below:

"For documents in notice and comment rule making proceedings, including summaries thereof, the date of publication in the Federal Register."

Although the foregoing language does not, in express terms, utilize the words "rulemaking proceedings of general applicability", this is the only meaning that could logically be ascribed to the scope of Section 1.4(b)(1), in light of the fact that Section 1.4(b)(3) applies only to "rule makings of particular applicability". Thus, the only way to logically reconcile Section 1.4(b)(1) with Section 1.4(b)(3) is to conclude that Section 1.4(b)(3) applies only to that subset of notice and comment rulemaking proceedings which are "of particular applicability", whereas Section 1.4(b)(1) applies to all other notice and comment rulemaking proceedings -- i.e., to those of general applicability.

proceeding did not allot any new channels which would be made available for applications by interested members of the public. Under these circumstances, there is no rational basis for concluding that this proceeding is anything other than a "rule making of particular applicability", within the meaning of Section 1.4(b)(3) of the Commission's Rules. Indeed, it is difficult to imagine any proceeding that would better qualify as a "rule making of particular applicability" than would the present proceeding.

In light of the foregoing, and in light of the fact that the Mass Media Bureau's October 7, 1992 Report and Order did not expressly state that a copy of the Report and Order was to be published in the Federal Register, "public notice" of the Report and Order, under Section 1.4(b)(3) of the Commission's Rules, occurred on the date of release of the Report and Order -- i.e., on October 7, 1992. Under the express language of Section 1.4(b)(3), the fact that a summary of the Report and Order was printed in the Federal Register on October 14, 1992 does not alter the foregoing. Hence, the date of "public notice" of the Report and Order, pursuant to Section 1.4(b)(3) of the Rules, was October 7, 1992, and, accordingly, pursuant to Section 1.429(d) of the Commission's Rules, any petitions for reconsideration of the Report and Order were required to be filed with the

Commission within 30 days following October 7, 1992 -- i.e., by the close of business on Friday, November 6, 1992. Since the Petitioners' Petition For Reconsideration was not filed with the Commission until one week thereafter -- i.e., until November 13, 1992 -- the Petition For Reconsideration is untimely.

Under Section 405(a) of the Communications Act, any petition for reconsideration must be filed with the Commission within 30 days from the date upon which public notice is given of the order, decision, report, or action complained of. The Commission has consistently held that it lacks the authority to extend or waive the statutory 30-day filing period for petitions for reconsideration that is specified in Section 405 of the Communications Act. See Albert D. Maizels, 20 FCC 2d 329 (1969); Metromedia, Inc., 56 FCC 2d 909, 909-10 (1975), reconsideration denied, 59 FCC 2d 1189 (1976); United Broadcasting Company of Florida, Inc., 61 FCC 2d 970, 972 (1976); Panola Broadcasting Co., 68 FCC 2d 533 (1978); Scripps-Howard Broadcasting Co., 69 FCC 2d 1477, 1478 (1978); American Broadcasting Companies, Inc. (KGO-TV), 86 FCC 2d 1 (1981); Commonwealth Telephone Company, 2 FCC Rcd 5299, 5301 (1989); Richardson Independent School District, 5 FCC Rcd 3135, 3136 (1990); Reuters, Ltd. v. FCC, 781 F.2d 946, 951-52 (D.C. Cir. 1986). This is so even if the

petition for reconsideration is filed only one day late.  
Metromedia, Inc., supra; Panola Broadcasting Co., supra;  
Richardson Independent School District, supra.

### III. Conclusion

In light of all the foregoing, the Commission lacks statutory authority to consider the alleged "merits" of the Petitioners' Petition For Reconsideration, since, as shown above, the Petition For Reconsideration was filed one week late. Accordingly, the Petition For Reconsideration should be summarily stricken without consideration.

Moreover, in light of the procedural deficiency and unacceptability of the Petition For Reconsideration, Martin respectfully requests that the Commission not issue any public notice of the filing of the Petitioners' Petition For Reconsideration, as contemplated by Section 1.429(f) of the Commission's Rules. Since the Petition For Reconsideration is



not cognizable, no useful purpose would be served by issuing any public notice of the filing of the Petition.

Respectfully submitted,

SCHUYLER H. MARTIN

By:   
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November 18, 1992

CERTIFICATE OF SERVICE

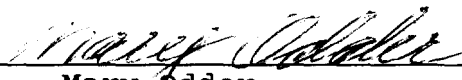
I, Mary Odder, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that I have on this 18th day of November, 1992, sent copies of the foregoing "Motion To Strike" by First-Class U.S. Mail, postage prepaid, or via hand-delivery, as indicated below, to the following:

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\_\_\_\_\_  
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\*/ Via Hand-Delivery